Supreme Court, U.S.
FILED

97 1248 JAN 27 1998

OFFICE OF THE CLERK

(1)

No.

In The
Supreme Court of The United States
October Term 1997

CALLAWAY COUNTY AMBULANCE DISTRICT
Petitioner,

v.

CHRISTINA PEEPER
Respondent.

Petition For A Writ Of Certiorari To the United States Court of Appeals For the Eighth Circuit

---

PETITION FOR WRIT OF CERTIORARI

THOMAS M. DUNLAP*
PAUL J. STINGLEY
JOSEPH P. WHYTE
Riley & Dunlap
10 East Fourth Street
Fulton, Missouri 65251-1751
(573) 642-7661

**Counsel of Record*

APPELLATE ADVANTAGE
4264 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

46 PP

QUESTIONS PRESENTED

I. Whether a United States Court of Appeals may decide a case on constitutional grounds: (1) that were not raised in the complaint in the district court; (2) upon which no evidence was presented at trial; (3) about which no argument was made to the district court in proposed findings of fact and conclusions of law; and, (4) which were not raised on appeal.

II. Whether a public ambulance district may prevent a member of the district's board from participating in, and voting on, certain confidential matters without abridging the board member's first amendment or fourteenth amendment rights where: (1) her husband is a full time employee of the district; (2) her husband is a member of the union authorized to negotiate with the ambulance district for benefits and pay; and, (3) her husband is suing the ambulance district for money damages related to his employment by the ambulance district.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. Factual Background 3

B. Proceedings Below 7

REASONS FOR GRANTING THE PETITION .. 8

I. The Necessity for Exercise of this Court's Supervisory Power 8

II. The Decision of the Court of Appeals is Erroneous 15

CONCLUSION 29

APPENDICES

A. Opinion of the United States Court of Appeals for the Eighth Circuit ..... A - 1

B. Findings of Fact, Conclusions of Law, Order, and Judgment of the United States District Court for the Western District of Missouri ..... B - 16

C. Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearing and Rehearing en Banc .... C - 27

D. Constitutional and Statutory Provisions ..... D - 28

E. Resolution ..... E - 36

TABLE OF AUTHORITIES

Cases: **Page**

Bond v. Floyd,
385 U.S. 116 (1966) 18

Buckley v. Valeo,
424 U.S. 1 (1976) 7, 18, 24, 25

Bullock v. Carter,
405 U.S. 134 (1972) 27

C.I.R. v. McCoy,
484 U.S. 3 (1987) 10, 11

Clarke v. U.S.,
705 F.Supp. 605 (D.D.C. 1988) 25

Clements v. Fashing,
457 U.S. 957 (1982) 28, 29

Federal Election Commission v.
National Conservative Political Action Committee,
470 U.S. 480 (1985) 18

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 25

Hormel v. Helvering,
312 U.S. 552 (1941) 10, 11, 14

Keckeisen v. Indp. Sch. Dist. 612,
509 F.2d 1062 (8th Cir. 1975) 24

Morrow v. Greyhound Lines, Inc.,
541 F.2d 713 (8th Cir. 1976) 12, 13, 14

Myers v. ANR Pipeline Co.,
959 F.2d 1443 (8th Cir. 1992) 12, 13

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 18

Nolte v. Pearson,
994 F.2d 1311 (8th Cir. 1993) 13

Perry Educ. Ass'n. v. Perry Local
Educs'. Ass'n., 460 U.S. 37 (1983) 7, 16, 20

Singleton v. Wulff,
428 U.S. 106 (1976) 11, 12

Thelen Oil Co., Inc. v. Fina Oil &
Chemical Co.,
962 F.2d 821 (8th Cir. 1992) 12

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 7, 22, 26

Wrzeski v. City of Madison, Wisc.,
558 F.Supp. 664 (W.D. Wisc. 1983) 18

Statutes and Rules:

Mo. Rev. Stat. Section 105.450(5) (1994) 3, 17

Mo. Rev. Stat. Section 105.452 (1994) . . . 3, 16, 22

Mo. Rev. Stat. Section 105.476 (1994) 3, 28

Mo. Rev. Stat. Section 610.021 (1994) . . . 2, 20, 25

United States Supreme Court Rule 10 14

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1997

CALLAWAY COUNTY AMBULANCE DISTRICT,
Petitioner

v.

CHRISTINA PEEPER,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Callaway County Ambulance District ("the Ambulance District") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 122 F.3d 619 and is set forth in Appendix A. The opinion of the United States District Court for the Western District of Missouri ("the district court") was unreported and the district court's Findings of Fact, Conclusions of Law and Order, and Judgment, are contained in Appendix B. The reported decision of the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit") mentions the order denying the suggestion for rehearing en banc and petition for rehearing, by a vote of six to five. The order is set forth in Appendix C.

JURISDICTION

The Eighth Circuit rendered its opinion reversing the decision of the district court in this case on August 19, 1997.

By a vote of six to five, the Eighth Circuit denied the suggestion for rehearing en banc and the petition for rehearing on October 29, 1997. This petition is timely filed pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved in this case are set forth in Appendix D:

U.S. CONST. amend. I (1791)
U.S. CONST. amend. XIV, Section 1 (1868)
Mo. Rev. Stat. Section 105.450(5) (1994)
Mo. Rev. Stat. Section 105.452 (1994)
Mo. Rev. Stat. Section 105.476 (1994)
Mo. Rev. Stat. Section 610.021 (1994)

STATEMENT OF THE CASE

Respondent, Christina Peeper, sued the ambulance district in the United States District Court for the Western District of Missouri in July, 1996. Respondent's law suit was filed under 42 U.S.C. Section 1983. Respondent sought injunctive relief, complaining that the ambulance district had violated her right to free exercise of speech under the first amendment of the United States Constitution. She also sought injunctive relief in federal court for violations of state law.

A. Factual Background. The following is a summary of the facts as found by the district court. (Apdx. B - 16 to 22)

Respondent was elected as a member of the ambulance district's board of directors on April 2, 1996, as a write-in candidate who received eight votes. The ambulance district is a political subdivision of the State of Missouri organized pursuant to the provisions of Chapter 190 of the Revised Statutes of Missouri. The ambulance district is a public, tax supported entity that provides ambulance services to the entire Callaway County, Missouri area. The ambulance district is governed by a six member elected board.

Respondent is married to and resides with Joe Peeper, a full-time employee of the ambulance district. Respondent's husband is a supervisor and part of his duties include disciplining other employees.

Owing to such relationship, on April 23, 1996, (at the Respondent's first board meeting as an ambulance district board member), a resolution (Resolution No. 1) was passed restricting involvement of Respondent in specified board activities. The ambulance district board operated under this resolution for the April 23, 1996 meeting, only.

Respondent, through her attorney, contacted the ambulance district and expressed several concerns regarding Resolution No. 1. Respondent urged that no resolution was required because enforcement of Missouri conflict-of-interest laws was delegated to the State of Missouri attorney general, because certain board functions from which Respondent was excluded could not properly be kept confidential under the provisions of Chapter 610 of the Revised Statutes of

Missouri, (the open meetings statute), because Resolution No. 1 was broader than permitted under the conflict-of-interest law, and because Respondent had been prohibited from discussing certain matters of district-wide interest.

Respondent's concerns regarding Resolution No. 1 resulted in a scheduled discussion of such resolution at the ambulance district's May 28, 1996 meeting. During the May 28, 1996 meeting, there was an extended discussion concerning Respondent's presence during certain closed sessions of the ambulance district's board meetings. The ambulance district rejected Respondent's suggestion that no resolution be adopted. The ambulance district passed and adopted a superseding resolution at its May 28, 1996 meeting, (Resolution No. 2), and rescinded Resolution No. 1. (Resolution No. 2 is set forth in Appendix E.) The ambulance district operated under Resolution No. 2 thereafter.

The Respondent actively participated at the April 23, 1996 meeting. She seconded two motions and was present during a closed session while a salary increase for the executive director of the ambulance district was discussed. Respondent actively participated at the May 28, 1996 meeting of the ambulance district. She made a motion, seconded another motion, and addressed the board during the employee and visitor comment portion of the meeting. Respondent's husband also addressed the ambulance district board during that portion of the same meeting to express his disagreement with a board decision to change the schedule of hours worked

by employees of the ambulance district. Further, Respondent was not entirely precluded from participating during a June 11, 1996, meeting of the ambulance district she attended.

The ambulance district was facing several issues at the time of passage of both Resolution No. 1 and Resolution No. 2. In early 1996, a lawsuit was threatened concerning overtime wages claimed to be due the employees. The suit was was filed thereafter and Respondent's husband is a plaintiff therein. A petition was filed with the Missouri State Board of Mediation attempting to organize employees of the ambulance district into a collective bargaining unit. The Missouri State Council of Firefighters sought to include Respondent's husband in the bargaining unit and he was subsequently included in the bargaining unit. The ambulance district at its April 23, 1996, meeting voted to change the hours worked by its employees, an issue that had been pending before the board since 1994. All three of these issues financially affected Respondent's husband.

Respondent's interpretation of the Missouri conflict of interest law is such that she deems it prohibits her from discussing only those matters that specifically address her husband by name. Given the opportunity, Respondent will attend, actively participate in, and vote on matters affecting her and her husband financially, including the union organization, litigation by her husband against the ambulance district, and determination of hours worked by employees (including her husband).

B. Proceedings Below. The district court conducted a non-jury trial. The district court ruled in favor of the ambulance district and against Respondent. The court held any issue regarding Resolution No. 1 was made moot by the passage of Resolution No. 2. The court found Resolution No. 2 to be content-neutral, citing Ward v. Rock Against Racism, 491 US 781 (1989). Likewise, the district court found Resolution No. 2 to be narrowly tailored to advance the compelling governmental interests of preventing the appearance of government corruption and promoting the effective functioning of government, citing Perry Educ. Ass'n. v. Perry Local Educs'. Ass'n., 460 US 37 (1983) and Buckley v. Valeo, 424 US 1 (1976). Accordingly, the district court found passage and enforcement of Resolution No. 2 did not compromise Respondent's right to freedom of speech under the first amendment, the only federal constitutional right alleged by Respondent to have been abridged by Resolution No. 2.

The Eighth Circuit reversed the decision of the district court in a decision reported at 122 F.3d 619 (8th Cir. 1997). The Eighth Circuit decided that Resolution No. 2 violated Respondent's first amendment associational rights and fourteenth amendment equal protection rights. Neither of these grounds was asserted or argued by Respondent in the district court or on appeal. By a vote of six to five, the Eighth Circuit denied the ambulance district's suggestion for rehearing en banc and petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. The action of the Eighth Circuit in deciding the case on the basis of issues not presented to it or to the trial court so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers of the federal judicial system.

The Eighth Circuit found:

> The resolution's provisions injure Peeper's First Amendment associational rights and her Fourteenth Amendment equal protection rights. The resolution creates a standard specific to Peeper that treats her differently than the other Board members, strongly implicating her Fourteenth Amendment equal protection rights. The restrictions also restrain Peeper's interaction with other board members, implicating her First Amendment associational rights.

The Respondent never asserted that Resolution No. 2 violated her first amendment associational rights or her fourteenth amendment equal protection rights. Respondent complained that Resolution No. 2 interfered with her speech

rights under the first amendment. In her Complaint, Respondent mentioned the fourteenth amendment only in the context of the fourteenth amendment making her first amendment speech guarantee applicable to the ambulance district as a political subdivision of the State of Missouri. The case was tried on the issues framed by the pleadings of Respondent.

Respondent filed a trial brief in support of her motion for preliminary injunction. The trial brief made no mention of first amendment associational rights or fourteenth amendment equal protection rights. The district court issued Findings of Fact, Conclusions of Law, and Order, and entered Judgment for the ambulance district based on the issues presented to it.

Respondent filed an Appellant's Form A with the Eighth Circuit which listed the issues on appeal. The three issues listed on Appellant's Form A are based on purported violations of her speech rights under the first amendment. Respondent's brief to the Eighth Circuit likewise shows that the issues in this lawsuit, as raised by Respondent, are whether Resolution No. 2 violated her speech rights under the first amendment. Likewise, Respondent's reply brief to the Eighth Circuit contained no mention of first amendment associational or fourteenth amendment equal protection rights. The ambulance district, and the district court, tried this case based on the pleadings filed and the arguments asserted by Respondent. Following the usual federal practice,

the ambulance district briefed and argued this appeal based on the arguments and issues advanced by Respondent. Respondent has never so much as mentioned a violation of her associational rights under the first amendment or equal protection rights under the fourteenth amendment. The Eighth Circuit reversed the district court ruling based on issues never presented to, nor considered by, the district court. That decision is contrary to the rule of law.

It has long been the practice in the federal judicial system that courts of appeal will not consider issues not raised below. One of the leading cases standing for this proposition is Hormel v. Helvering, 312 U.S. 552 (1941). In that case, the Commissioner of Internal Revenue argued on appeal that trust income received by the petitioner was taxable under a section of the internal revenue code that was different than the sections argued before the Board of Tax Appeals. This Court stated the general rule that "an appellate court does not give consideration to issues not raised below." Hormel, at 556. The Court further held that deviation from the ordinary practice should not occur unless "the obvious result would be a plain miscarriage of justice." Hormel, at 558.

This Court in C.I.R. v. McCoy, 484 U.S. 3 (1987), another tax case, implied that the general rule was much more far-reaching. The Court stated that federal courts of appeal have jurisdiction to review decisions of the Tax Court in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. McCoy, at

6. The instant case is a civil action which was tried to the district court without a jury. The McCoy decision stated that the duty of the court of appeals in reviewing the decisions of the Tax Court or the district court in a civil action without a jury is to consider whether error was committed. Id. The court went on to hold that the consideration of matters that were not the subject of the proceeding in the Tax Court is in excess of the jurisdiction of the court of appeals. This Court thereby suggested that the court of appeals likewise exceeds its jurisdiction when it considers matters not raised at trial. Id.

This rule of law is not limited to tax cases. In Singleton v. Wulff, 428 U.S. 106 (1976), the court emphasized that deviation from the ordinary practice of refusing to consider issues not raised in the trial court is limited to cases such as those "where the proper resolution is beyond any doubt" or where "injustice might otherwise result". Singleton, at 121. (citations omitted). In Singleton, the case was dismissed by the district court for lack of standing. The court of appeals reversed on the standing issue and went further to review the case on the merits, which had obviously not been presented when the case was dismissed in the district court. This Court reversed the court of appeals. The Singleton decision, quoting Hormel, supra, stated the rationale for the rule that a federal appellate court does not consider an issue not passed upon below: "[It is] essential in order that parties may have the opportunity to offer all the

evidence they believe relevant to the issues . . . and in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Singleton at 120. The court went on to explain that it is not for an appellate court to surmise as to what that evidence may have been and stated that in addition to evidence, the litigant should have the opportunity to present whatever legal arguments the party desire at the district court level. Id.

The Eighth Circuit, following the lead of this Court, has maintained the same practice. In Morrow v. Greyhound Lines, Inc., 541 F.3d at 713 (8th Cir. 1976), Greyhound asserted trial court error because of wrongful admission of expert testimony. The Eighth Circuit, noting the asserted error was different from the basis upon which appellant had objected at trial, and that Greyhound had not raised the purported error in its motion for new trial, refused to consider the error on appeal. Morrow, 541 F.2d at 723-24. In Thelen Oil Co., Inc. v. Fina Oil & Chemical Co., 962 F.2d 821 (8th Cir. 1992), Fina claimed for the first time on appeal that Thelen's claim was barred by the doctrine of laches. The Eighth Circuit declined to consider Fina's laches defense because it was not raised in the trial court. Thelen, 962 F.2d at 823. Similarly, in Myers v. ANR Pipeline Co., 959 F.2d 1443 (8th Cir. 1992), appellant E-CON argued that its contractual indemnification of ANR was not in effect on the date of the accident that gave rise to the suit. E-CON did not

raise the argument in the trial court and the Eighth Circuit refused to allow E-CON to do so on appeal, stating, "[t]his is not one of those extraordinary cases" in which a "plain miscarriage of justice" would result or the result "would be inconsistent with substantial justice" if the Eighth Circuit refused to consider an argument on appeal that was not raised at trial. Myers, 959 F.2d at 1448.

Morrow makes it clear that it is unjust in the ordinary case (such as this) to allow a party to raise an issue on appeal that was not presented to the trial court. It is no less unjust, and the rationale behind the rule is done no less a disservice, when the Eighth Circuit, sua sponte, decides a case on issues not presented in the district court or, for that matter, to the Eighth Circuit. The Eighth Circuit has recognized as much. In Nolte v. Pearson, 994 F.2d 1311 (8th Cir. 1993), a suit based on common law fraud, the Eighth Circuit's examination of the case revealed that the trial court committed the basic error of improperly applying a "clear and convincing" standard for plaintiffs' burden of proof when Nebraska law required proof by only a preponderance of the evidence. "However, plaintiffs neither questioned the application of the clear and convincing evidentiary standard in the district court nor raised the issue" on appeal to the Eighth Circuit. Nolte, 994 F.2d at 1315. Because the evidentiary standard was not called to the district court's attention and the trial judge was not given an opportunity to consider the issue, the Eighth Circuit, citing Morrow, refused to consider the issue. Id.

Neither the trial court nor the ambulance district was given the opportunity to address Respondent's associational or equal protection rights. The denial of such opportunity to the trial court and the ambulance district is inconsistent with the long line of cases of which the holdings in Morrow and Hormel are illustrative.

The Eighth Circuit made no "miscarriage of justice" or "resolution beyond any doubt" finding which would justify deciding this case on issues that were not raised in the trial court. Indeed, the Eighth Circuit implicitly found that this was not such a case. The Eighth Circuit found that Resolution No. 2 implicated not only Respondent's first and fourteenth amendment rights, but the constitutional rights of the voters as well. (Apdx. A-10 and 11). However, the Eighth Circuit declined to consider the issue of the voters' rights because Respondent "does not raise the issue". (Apdx. A-11, fn. 5).

The Eighth Circuit became an advocate for Respondent. Rule 10 of the Rules of the Supreme Court of the United States provides that a writ of certiorari is appropriate when "a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power". This is such a case and the petition should be granted.

II. The decision of the Eighth Circuit is erroneous in that Resolution No. 2 does not infringe upon Respondent's constitutional rights.

The relations between the ambulance district and its employees had deteriorated to the point of antagonism by April 23, 1996, the date of Respondent's first meeting as a member of the ambulance district board and date of passage of Resolution No. 1 governing her conduct while on the ambulance district board.

Three substantial issues confronted the ambulance district board at the time Respondent became a board member. While not inclusive of all situations in which a conflict of interest could arise, they are illustrative of the problems created by the full participation of Respondent in all ambulance district matters.

1) Fair Labor Standards Act Litigation - Suit against the ambulance district was threatened in early 1996 by an employee of the ambulance district. This threat was renewed by the Missouri State Council of Fire Fighters ("MSCFF") on April 22, 1996, regarding back overtime wages purportedly owed by the ambulance district to certain employees. Suit was filed over this issue. Respondent's husband is among the plaintiff-employees seeking monetary relief from the ambulance district.

2) Union Organization - At the same time it threatened the ambulance district with suit, MSCFF informed

the ambulance district that its employees were organizing. Prior to trial of this case, a petition was filed with the Missouri State Board of Mediation seeking to recognize a union for the ambulance district employees. The petition was granted and Respondent's husband is a member of the union.

3) Employee Scheduling - Since at least 1994, the ambulance district had considered changing the hours worked by its employees from 24 to 8 hour shifts. The change was resisted by the employees, but on April 23, 1996, the change was made, and effective July 1,. 1996, all employees, including Respondent's husband, were subject to the new schedule.

It was against this backdrop that the ambulance district adopted Resolution No. 2.

Resolution No. 2 is constitutionally sound under the heightened scrutiny of a content-based regulation. Under such "strict scrutiny", the test is whether Resolution No. 2 advances a compelling interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n. v. Perry Local Educs'. Ass'n., 460 U.S. 37 (1983).

A. Resolution No. 2 Advances Compelling Government Interests

Section 105.452 RSMo. provides in relevant part that:

> No elected or appointed official or

employee of the state or any political subdivision thereof shall:

* * *

(2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse . . .

(3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person;

(4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or his spouse . . . In all such matters such officials must recuse themselves from acting . . .

"Confidential information" is defined as "all information . . . which is of such a nature that it is not, at that time, a matter of public record or public knowledge". Section 105.450(5) RSMo.

At least two of the ambulance district's interests in enforcing Resolution No. 2 have been held to be "compelling": 1) Preventing the appearance of government corruption; and 2) Promoting the effective functioning of government.

The interest in preventing government corruption was held to be compelling in Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985). Preventing the appearance of corruption is equal to the interest in preventing actual corruption; both tend to undermine representative democracy. Buckley v. Valeo, 424 U.S. 1 (1976). The stated purpose of the ambulance district in adopting Resolution No. 2 was to ensure compliance with the State of Missouri Conflict of Interest Law found at Chapter 105, RSMo. The purpose of that law is to prevent government corruption. Compliance with such law is a compelling governmental interest.

Second, promoting the effective functioning of the governmental body is itself a compelling interest. Speech that substantially hinders the functioning of the governmental body may be subject to restriction on that basis. Wrzeski v. City of Madison, Wisc., 558 F.Supp. 664, 668 (W.D. Wisc. 1983). The central commitment of the first amendment is that "debate on public issues should be uninhibited, robust, and wide-open." Bond v. Floyd, 385 U.S. 116, 136 (1966), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). As noted above, the issues about which Respondent

asserts that her "speech" rights have been violated are not public. Rather, these matters are confidential. It is nevertheless important for the ambulance district board members to have "uninhibited, robust, and wide-open" debate on these issues during closed sessions of the board. The presence of Respondent in the room when the board is discussing union representation and overtime wage litigation will severely chill any debate on those issues, as found by the district court. (Apdx. B-21, paragraph 36).

Furthermore, the ambulance district has a compelling interest in maintaining the propriety and fairness of financial matters affecting its employees. Its main revenue source is tax money paid by Callaway County, Missouri property owners. The ambulance district is a trustee of public funds and as such, has a duty to use money appropriately and avoid the appearance of impropriety regarding expenditures. The ambulance district board must be exceedingly sensitive to the effect the husband and wife relationship between board member and employee has on virtually all the ambulance district's financial matters. The presence of an employee's spouse in such confidential meetings and action by her on such issues subverts such propriety and, at minimum, creates the appearance of unfairness to other ambulance district employees and among the general public. These are compelling interests, and have been so adjudicated.

B. Resolution No. 2 is Narrowly Drawn

Resolution No. 2 is "narrowly drawn". Perry, supra. The language of Resolution No. 2 tracks that of the Missouri open meetings statute, Section 610.021, RSMo. Said section defines closed, (and therefore legally confidential), matters:

> (1) Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys... Legal work product shall be considered a closed record;
>
> * * *
>
> (3) Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded.
>
> * * *
>
> (5) Nonjudicial mental or physical health proceedings involving identifiable

persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment;

* * *

(7) Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

* * *

(9) Preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups;

* * *

(13) Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions,

salaries and lengths of service of officers and employees of public agencies once they are employed as such;

(14) Records which are protected from disclosure by law;

* * *

Other pertinent language of Resolution No. 2 prevents Respondent from becoming privy to information concerning, or voting upon, ". . . [b]udgetary items involving the compensation, benefits, and pensions paid to employees" and the "hiring, promotion, discipline, compensation, benefits, and pensions of employees..." The foregoing matters could result in financial benefit to Respondent.

The conflict-of-interest statute, Section 105.452, RSMo, prohibits using "confidential" information for personal gain. Such "confidential" information pursuant to the open meeting law (Chapter 610, RSMo) is the only information Respondent is prevented from receiving.

A resolution is narrowly drawn if it represents the "least restrictive alternative" for advancing the interests at stake. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The adoption of Resolution No. 2 as drawn is the least restrictive alternative for advancing the ambulance district's compelling interests. The only way to prevent the appearance

of impropriety and ensure proper functioning of the ambulance district with respect to these issues is to prevent Respondent from being present when they are discussed. Respondent's only proffered alternative is for the ambulance district to do nothing; trust her to keep confidential information confidential; and, hope that evidence of a violation of the conflict of interest law is discovered so that it can be reported to the Missouri Attorney General.

The Eighth Circuit has held that a policy preventing husbands and wives from maintaining an administrator-teacher relationship is constitutionally valid.

> [The] mere existence of a husband-wife/administrator-teacher situation is bound to have a deleterious effect on . . . morale . . . [W]e cannot say that a policy based on the assumption that married couples are susceptible to the natural prejudices of their relationships is irrational, arbitrary, or capricious. . .This court does not feel that where such definite possibilities of conflict of interest exists, the board should be placed under a constitutional burden of having to wait until a conflict of interest becomes a problem situation before it can take any action. The law should not block legitimate measures taken to anticipate problems and

avert them.

Keckeisen v. Indp. Sch. Dist. 612, 509 F.2d 1062, 1066 (8th Cir. 1975).

The unlikelihood of discovering a violation in these circumstances, when people may be surreptitious and secretive about their dealings is recognized by the case law. The scope of government corruption can never be reliably ascertained. Buckley, at 27. The plaintiffs in Buckley unsuccessfully contended that contribution limits to political campaigns should be invalidated because bribery laws constituted a less restrictive means of dealing with actual and suspected quid pro quo arrangements. "But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts...to influence governmental action." Buckley, at 27, 28.

The adoption of Resolution No. 2 was appropriate in light of the issues facing the ambulance district, the relationship between Respondent and her district employee husband, and the necessity of avoiding conflicts-of-interest while ensuring effective government functioning. Resolution No. 2 meets the "narrowly drawn" test.

C. Resolution No. 2 is Content Neutral and Leaves Open Alternative Channels of Communication

Respondent claimed her first amendment free speech

rights were violated. Her burden of proof involved four separate elements. Clarke v. U.S., 705 F.Supp. 605, 608 (D.D.C. 1988), aff'd by Clarke v. U.S., 886 F.2d 404 (1989); citing First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), rehearing denied 438 U.S. 907 (1978). In order to prevail, Respondent first needed to prove her ability to consider and vote on each and every issue to come before the ambulance district was "speech" within the meaning of the first amendment. Second, Respondent had to show the condition placed upon her "speech" by the ambulance district constituted a burden on such speech. Third, she had to show the ambulance district has no legitimate interest in restricting her speech. Finally, Respondent had to prove the ambulance district's interest in restricting her speech did not outweigh the value of the speech restricted. Id.

The restrictions placed on Respondent by Resolution No. 2 do not involve speech dealing with matters of public concern. Instead, they deal with matters that are confidential and closed to the public pursuant to Missouri statute. Section 610.021, RSMo. Hence, the "value" of the "speech" in which Respondent claims first amendment protection is not equivalent to the value of speech on matters of public debate. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

Resolution No. 2 is "content-neutral" as that term is used in first amendment analysis. "The principal inquiry in determining content-neutrality, in speech cases generally ... is whether the governmental regulation of speech... [occurs

because of] ...disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted). By her own testimony, Respondent never offered a "message" concerning issues facing the ambulance district, either before or after adoption of Resolution No. 2. Consequently, Resolution No. 2 is content-neutral.

A regulation which is content-neutral, narrowly tailored to serve a significant governmental interest, and which leaves open ample alternative channels of communication, is permissible, despite burdens it may place on speech, as a reasonable time, place, and manner restriction of speech. Ward at 799. The ambulance district's interest in preventing the appearance of corruption and in ensuring the effective functioning of the ambulance district are not only significant, but also "compelling" for purposes of the first amendment. Resolution No. 2 only governs Respondent's participation in certain confidential district business at closed district meetings. Ample alternative channels are left open to Respondent for expressing her views, if any. Respondent is not restricted from actively participating in all confidential closed meetings. Respondent's presence is not restricted at open meetings. Accordingly, Resolution No. 2 imposes reasonable time, place, and manner restrictions on Respondent's speech.

D. Resolution No. 2 Does Not Violate Respondent's Equal Protection or Associational Rights

The Eighth Circuit, relying on Bullock v. Carter, 405 U.S. 134 (1972), held that Respondent's associational and equal protection rights were violated by Resolution No. 2. Bullock recognizes that incidental burdens on office holders are not subject to a stringent standard of review and need only be rationally related to the interests sought to be promoted. Bullock, at 142-143. It is only when the rights of voters are implicated that closer scrutiny is utilized and the burden must be "reasonably necessary to the accomplishment of legitimate state objectives." Bullock, at 144. As noted above, the issue of voters' rights are not present in the instant suit, the Eighth Circuit having refused to consider same because not raised by Respondent.

Although the Eighth Circuit purports to use a "rational" basis for examining the constitutionality of Resolution No. 2, it is clear from a reading of the case that the Eighth Circuit in effect utilized a "reasonably necessary" standard. By focusing on specific provisions of the resolution rather than looking at it in its complete context, the court used a "reasonably necessary" standard. The overall effect of Resolution No. 2 is to prevent Respondent from receiving certain confidential information. Obviously, if Respondent cannot receive information she cannot use it to violate the conflict of interest law. Accordingly, Resolution No. 2 is

rationally related to the ambulance district's legitimate objectives as stated in the resolution and as found by the district court.

The Eighth Circuit completely ignored the dictates of Section 105.476, RSMo, which provides that "nothing in [the conflict-of-interest statute] shall prohibit any political subdivision from establishing additional or more stringent requirements...". The proper focus is whether the ambulance district's goals are furthered by Resolution No. 2, and not whether each specific subsection of Resolution No. 2 precisely, and without deviation therefrom, promotes a corresponding explicit goal or specific subsection of the conflict-of-interest law. Section 105.476, RSMo, recognizes that the goals of the conflict-of-interest law are implicated by an infinite variety of real world situations and that legislation cannot be effectively drafted to cover each such situation. Hence, political subdivisions such as the ambulance district are given the discretion and power to tailor requirements to respond to conflict-of-interest situations in order to further the compelling goals behind the legislation.

Moreover, the Eighth Circuit failed to examine the practical effect of Resolution No. 2. As the district court found, passage of Resolution No. 2 did not prevent Respondent from actively participating in board meetings. (Apdx. B-22 and 23, paragraphs 21 and 23). Resolution No. 2 is the type of de minimis burden to Respondent allowed by Clements v. Fashing, 457 U.S. 957, 972 (1982). "[O]nly

those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause . . . " Clements, at 967.

Resolution No. 2 does not violate Respondent's first amendment speech rights. It is narrowly drawn to promote compelling governmental interests. Resolution No. 2 does not violate Respondent's first amendment associational rights or fourteenth amendment equal protection rights. It is rationally related to legitimate governmental interests. The decision of the Eighth Circuit on these important constitutional issues is erroneous.

CONCLUSION

The petition for a writ of certiorari to the Eighth Circuit should be granted.

Respectfully submitted.

Thomas M. Dunlap
Counsel of Record
Paul J. Stingley
Joseph P. Whyte
Riley & Dunlap, P.C.
10 East Fourth Street
Fulton, MO 65251
573/642-7661
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINION
FILED, AUGUST 19, 1997

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3864

Christina Peeper,	*
Appellant,	*
	*
	* Appeal from the
	* United States
v.	* District Court for
	* the Western
	* District of
Callaway County	* Missouri.
Ambulance District,	*
a political	*
subdivision of	*
the State of	*
Missouri	*
Appellee.	*

Submitted: May 21, 1997
Filed: August 19, 1997

Before MURPHY, HEANEY, and MAGILL, Circuit Judges.

HEANEY, Circuit Judge.

Appellant, Christina Peeper, sought injunctive relief from a resolution of, a county ambulance district board of directors limiting her participation as a member of that board because of her marriage to an employee of the ambulance district. The district court denied Peeper's motion, holding that the resolution was narrowly drawn. to meet significant state interests. We reverse.

In April 1996, Peeper became a member of the Callaway County Ambulance District Board of Directors ("Board") after winning an election for the seat representing her subdistrict. Peeper's husband had worked as an emergency medical technician and supervisor for the Callaway County Ambulance District ("District") for two years at the time of Peeper's election to the Board. The District is a corporate body and political subdivision of the State of Missouri governed by the six-member Board. At the time of Peeper's election, the District and its employees were engaged in discussions over three major issues affecting their employment relationship: threatened litigation regarding overtime wages under the Fair Labor Standards Act; organization of the employees of the District for purposes of collective bargaining, and the schedule and hours worked by District employees.

Peeper attended her first meeting as a member of the Board on April 23, 1996. After conducting its routine business and election of officers, the Board adopted, over Peeper's objection, a resolution limiting Peeper's participation as a member of the Board. On May 28, 1996, the Board passed an amended resolution with the same goal. The resolution provided:

> [I]n order to comply with applicable law. and effectively prevent Christin[a] Peeper from using confidential information concerning the District for financial gain,. . . the undersigned board members desire and do hereby allow Christin[a] Peeper to participate in any District matter except she may not participate in discussion involving, or vote upon, any of the following:
>
> A. Legal actions, causes of action or litigation between the District and its employees and any confidential or privileged communication between the District or its representatives and its attorneys or legal work product;
>
> B. Hiring, firing, disciplining or promoting of particular employees by the District when personal information about the

employee, including information relating to the performance or merit of individual employees, discussed or recorded;

C. Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

D. Preparation, including any discussions or work product, on behalf of the District or its representatives for negotiations with employee groups;

E. Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, including information relating to medical, psychiatric, psychological, or alcoholism. or drug dependency diagnosis or treatment; and,

F. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the board may, by majority vote, decide to prevent Christin[a] Peeper from hearing, participating in, or voting upon.

. . .[I]n order effort [sic] to comply with applicable law and effectively prevent Christin[a] Peeper from acting in matters that would result in a specific monetary benefit to

her or her spouse, that Christin[a] Peeper is directed to recuse herself and if she does not recuse herself she is prohibited from hearing, participating in, or voting upon the following:

A. Budgetary items involving the compensation, benefits, and pensions paid to employees;

B. The hiring, promotion, discipline, compensation benefits, and pensions of employees of the District; and

C. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which. the board may, by majority vote, decide to prevent Christin[a] Peeper from hearing, participating in, or voting upon.

(Jt. App. at 62-64). The Missouri conflict-of-interest law, to which the resolution refers provides, in part, that:

No elected or appointed official or employee. . .of any political Subdivision [of the state] shall:

. . .

(2) Use confidential information[1]

---

[1]Confidential information is defined as "all information ... which is of such a nature that it is not, at that time, a matter of public record or public knowledge." Mo. Rev. Stat. § 105.450(5)

> obtained in the course of or by reason of . . [her] official capacity in any manner with intent to result in financial gain for [her]self [or her] spouse. . .;
>
> (3) Disclose confidential information obtained in the course of or by reason of [her] ... official capacity in any manner with intent to result in financial gain for [her]self or any other person;
>
> (4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or [her] spouse . . .In all such matters such officials must recuse themselves from acting. . .

Mo. Rev. Stat. § 105.454 (1997) (footnote added). Board members expressed concern about their own potential criminal liability[2] in the event Peeper misused information she received as a member of the

---

(1997).

[2]The Missouri conflict-of-interest law imposes criminal sanctions on any person who violate its strictures. The first knowing violation of the conflict-of-interest law constitutes a class by misdemeanor under Missouri law. Mo. Rev, Stat. § 105.478(1)(1997). A party committing a second offense under the law is guilty of a class D felony. Id. § 105.478(2).

Board.

Peeper protested the May resolution and filed a claim in federal court seeking injunctive relief based on her claim that the resolutions violated her rights under the First and Fourteenth Amendments to the United States Constitution and under the free speech clause of the Missouri Constitution. The district court denied Peeper's request for relief. The court held that the May resolution is "content-neutral," narrowly tailored to meet the significant government interests of preventing the appearance of government corruption and promoting the effective functioning of the District, and leaves open alternative channels of communication for Peeper. Id. at 6. The court further held that the May resolution conforms to the provisions of the Missouri conflict-of-interest law, specifically citing section 105,476 which provides, in part, that "nothing in [s]ections 105.450 to 105.498 shall prohibit any political subdivision from establishing additional or more stringent requirements than those specified in [s]ections 105.450 to 105.498." Mo. Rev. Stat. § 105.476 (1997). The restrictions in the May resolution place limitations on Peeper that are not rationally related to the goals of Missouri conflict-of-interest law and that impinge on Peeper's First Amendment associational rights and her Fourteenth Amendment equal protection rights. Therefore, we reverse.

II.

We review the district court's conclusions of law de novo. United States v. Kistner, 68 F.3d 218, 220-21 (8th Cir. 1995). Our first task is to determine whether the challenged resolution deserves scrutiny that goes beyond that traditionally required for restrictions placed on candidates or officeholders. See Clements v. Fashing, 457 U.S. 937, 963 (1981). Where a regulation implicates a fundamental right, such as the First Amendment's free speech guarantee, we review the regulation under heightened scrutiny, Id. If no fundamental right is implicated, traditional equal protection principles apply. Id. Traditional equal protection principles dictate that state-imposed burdens that affect some citizens differently than others offend equal protection under the Fourteenth Amendment only if such a burden is "wholly irrelevant to the achievement of the [s]tate's [constitutional] objectives." McGowan v. Maryland, 366 U.S, 420, 425 (1961).

The district court examined the May resolution under the First Amendment strict scrutiny standard.[3] We disagree

---

[3]Strict scrutiny under the First Amendment dictates that a state may not restrict speech on a content basis unless it can show the restriction is narrowly tailored to serve a compelling state interest. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. ___, ___(1996).

that strict scrutiny applies to the limitations at issue. An individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office. Because of the analogous rights involved, we employ the same constitutional test for restrictions on an officeholder as we do for restrictions on candidacy. In reviewing candidacy restrictions, the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." Bullock v. Carter, 405 U,S. 134, 143 (1972). The Supreme Court has upheld restrictions on candidacy that are unrelated to First Amendment values and that "protect the integrity and reliability of the electoral process itself " See Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (citing Clements, 457 U.S. at 973 (upholding state provision prohibiting an incumbent Justice of the Peace from. seeking election to the state legislature)). To determine whether to uphold restrictions on candidacy, we first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" caused by *the* challenged restriction. Anderson, 460 U.S. at 789. Following that evaluation, we must:

> identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and the strength of each of

> those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id.

Following this process, we initially consider the injury caused by restrictions on the officeholder. As is the case with restrictions on candidacy, restrictions on an elected official's ability to perform her duties implicate the interests of two distinct parties: the individual's First Amendment associational rights and Fourteenth Amendment equal protection rights; and the voters' rights to be meaningfully represented by their elected officials. Cf. Bullock, 405 U.S. at 143 (1972) ("[T]he rights of voters and the rights of candidates do not always lend themselves to neat separation" when considering the effect of limitations on candidacy). Restrictions on a public official's participation necessarily, affect that individual's First Amendment associational rights and Fourteenth Amendment equal protection rights.[4]

---

[4]Limitations on an elected official's participation the proceedings of a public body such as the District also conceivably affect the official's First Amendment free speech rights, which would require us to apply strict scrutiny as Peeper suggests. Here, however, the May resolution only limits Peeper's participation as a member of the Board and does not limit her ability to vote for Board members, to speak before the Board during public comment periods, or to

Legitimate state interests may warrant restrictions that are de minimis limitations of the official's participation. See Clements, 457 U.S. at 972-73. Restrictions on an officeholder after election also infringe upon voters' rights to be represented even more severely than when a state similarly restricts candidacy.[5]

Although the district court upheld the May resolution applying the more rigid strict-scrutiny standard, we hold the resolution unconstitutional under rational-basis review The

---

otherwise express her opinions about the District's operation as any other citizen may under the First Amendment's free speech guarantee.

[5]Candidacy restrictions affect the voters' First Amendment right to be represented by reducing the pool of candidates, although voters have the opportunity to recruit other candidates to represent their viewpoints. See Plante v. Gonzalez, 575 F.2d 1119, 1126 (2d Cir. 1978) (requirements for candidacy are not unconstitutional unless they deny a cognizable group of citizens the night to meaningful representation through other candidates). Limitations on an officeholder, by contrast, provide voters no opportunity to be heard through an alternative representative. If the restrictions prevent the officeholder from meaningfully representing the voters who elected the official, such restrictions are subject to strict scrutiny. See Bullock, 405 U.S. at 143. Because Peeper does not raise the issue of the voters' rights, and because we hold the May resolution unconstitutional under the rational-basis test, we need not determine whether strict scrutiny applies.

resolution's provisions injure Peeper's First Amendment associational rights and her Fourteenth Amendment equal protection rights. The resolution creates a standard specific to Peeper that treats her differently than other Board members, strongly implicating her Fourteenth Amendment equal protection rights. The restrictions also restrain Peeper's interaction with other Board members, implicating her First Amendment associational rights.

Having determined that the resolution injures Peeper's First and Fourteenth Amendment rights, we evaluate the state's purported interests and whether the restrictions rationally serve those interests. The Board's stated interests are threefold: to prevent the misappropriation of information for personal gain; to prevent the appearance of impropriety; and to promote the free flow of ideas among members of the Board.[6] Each of these interests, if served, can at a minimum constitute a reasonable state interest. See, e.g., FEC v. National Conservative Political Action Comm, 470 U.S. 480,

---

[6]Board members also expressed an interest in avoiding their own criminal liability for violations of the Missouri conflict-of-interest law that Peeper might commit. Yet, the statute requires a person to "knowingly" violate the conflict-of-interest law before that person is subject to criminal liability. Mo. Rev. Stat. § 105.478(1). The mere presence of Peeper in discussions that are not specific to her husband cannot constitute, knowledge of, much less the "aiding or abetting" of a violation of the statute on the part of other Board members.

500 (1985) (government's interest in avoiding corruption is compelling); Buckley v. Valeo, 424 U.S. 1, 27 (1976) (prevention of the appearance of corruption is a concern almost equal to the prevention of actual corruption); New York Times Co. v. Sullivan, 376 U.S. 270 (1964) (uninhibited, wide-open debate should be a "profound national commitment" and a "fundamental principle of the American government"). In this case, however, the portions of the resolution that restrict Peeper from participating in or even hearing discussions not directly related to her husband do not rationally relate to those interests.

The May resolution limits Peeper in a wide range of matters, most of which do not involve the concerns expressed by the Board or addressed by the conflict-of-interest law. For instance, the May resolution prevents Peeper from participating in discussions of or voting on "[l]egal actions, causes of action or litigation between the District and its employees" without a requirement that the topic be related to Peeper's husband's employment. Likewise, the resolution prevents Peeper from participating in discussions of hiring or firing employees or addressing testing and examination materials without regard to whether Peeper's husband is associated with the matters. The resolution goes well beyond the Missouri conflict-of-interest law's general prohibition of the misuse of confidential information for financial gain and recusal requirement for measures "designed . . .to provide a special monetary benefit" to the official or her spouse.

The Board's concern about keeping its discussions free-flowing, particularly during the Board's closed sessions, is based on its belief that Peeper's presence would chill discussions between other Board members. This chilling, the Board contends, stems from the other Board members' opinion that if Peeper is present she might pass on confidential information to her husband who would, in turn, pass it on to his Co-workers. It is incongruous, however, for a state to allow the election of people with such relationships to public office and then consider them less-trustworthy stewards of confidential information merely because of these relationships. The Missouri conflict-of-interest law prohibits any public official from misusing confidential information or acting, for self-benefit, and those with spouses employed by the public bodies they serve perhaps face greater temptations to run afoul of that prohibition. One does not however, face any additional temptation where the matters are unrelated to the official's spouse. Yet the May resolution prohibits Peeper from participating in any matter dealing with any employee's records, any testing material, or the hiring or firing of any employee. The Board's interest in preventing Corruption or at least the appearance of corruption is not served by the vast portions of the May resolution that go beyond matters that could not lead or appear to lead to corrupt behavior by Peeper. As such, those portions of the May resolution are not rationally related to the state interests cited by the Board.

Because provisions of the May resolution infringe

upon Peeper's constitutional rights under the First and Fourteenth Amendments without being rationally related to a legitimate state interest, the May resolution cannot stand as written.

III.

We reverse the decision of the district court. In light of our holding that the May resolution cannot stand as written, no injunctive relief is necessary.

A true copy.

Attest,

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER AND JUDGMENT
FILED, SEPTEMBER 27, 1996

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CHRISTINA PEEPER,	)
Plaintiff,	)
	)
v.	) Case No.
	) 96 4228-CV-C-2
	)
CALLAWAY COUNTY	)
AMBULANCE DISTRICT,	)
Defendant.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT

1. Plaintiff is a citizen and resident of Williamsburg, Callaway County, Missouri.

2. Defendant is a political subdivision of the State of Missouri organized pursuant to the provisions of Section 190.005 et seq. RSMo.

3. Defendant is a public, tax supported entity that provides ambulance services to the entire Callaway County, Missouri area.

4. Defendant is governed by a six member elected board presently consisting of Jean Benzen, Kathy Courtright, Steve Anderson, Cindy Smola, John Wheeler, and Plaintiff.

5. Plaintiff was duly elected a member of the board of directors on April 2, 1996 as a write-in candidate who received eight votes.

6. Prior to being elected, Plaintiff did not campaign for the position, did not have a platform, did not run in response to any issue confronting Defendant, and did not publicly espouse any view on any issue confronting Defendant.

7. Plaintiff is married to and resides with Joe Peeper, a full time employee of Defendant.

8. Plaintiff's husband is a supervisor and part of his duties include disciplining other employees.

9. After her election, Plaintiff received a memorandum from Defendant's executive director, calling to her attention the provisions of the Missouri Conflict of Interest Law.

10. Plaintiff attended her first board meeting of Defendant as an elected member on April 23, 1996.

11. At the April 23, 1996 board meeting of Defendant, a resolution was passed directed towards Plaintiff's involvement in specified board activities. ("Resolution #1").

12. The board operated under Resolution #1 for

the remainder of the April 23, 1996 meeting.

13. During the April 23, 1996 meeting, Plaintiff actively participated; she seconded two motions and was present during a closed session while a salary increase for the executive director was discussed.

14. By letter dated May 14, 1996, Plaintiff's attorney contacted Defendant expressing the following concerns regarding Resolution #1:

A. Enforcement of the conflict of interest laws was delegated to the Attorney General of the State of Missouri;

B. Information from which Plaintiff was excluded under the April 23, 1996 resolution could not properly be kept confidential under the provisions of Chapter 610 RSMo., the open meeting statute;

C. The resolution was broader than permitted under Chapter 105 RSMo.; and

D. Plaintiff had been prohibited from discussing certain matters of district-wide interest, including the change in hours of the employees.

15. As a result of such concerns, the board scheduled discussion of the resolution for its May 28, 1996 meeting.

16. An extended discussion concerning Plaintiff's presence during certain closed sessions of Defendant's meetings was held at the May 28, 1996 meeting of Defendant.

17. Plaintiff proposed that no resolution be adopted and Plaintiff be allowed to police her own activities with relation to the Missouri Conflict of Interest Law.

18. At the May 28, 1996 meeting the Defendant passed and adopted a superseding resolution, ("Resolution #2"), and rescinded Resolution #1.

19. Defendant operated under Resolution #2 during the remainder of its May 28, 1996 meeting and has operated under Resolution #2 since that time.

20. Resolution #2 addresses concerns raised by Plaintiff. It is couched in the terms of the open meeting statute. Section 610.021 RSMo.

21. At the May 28, 1996 meeting, while Defendant was operating under Resolution #2, Plaintiff actively participated; she made a motion, seconded another motion, and addressed the board during the employee and visitor comment portion of the meeting.

22. During the May 28, 1996 meeting, Plaintiff's husband addressed the board regarding the change in hours worked by employees. He did so during a scheduled agenda item where supervisors addressed Defendant and, further, during the employee and visitor comment portion of the meeting.

23. Plaintiff attended a June 11, 1996 special

meeting of the Defendant and was not precluded from participating in that meeting.

24. Prior to passage of Resolution #1, defendant was facing several issues, the outcome of which could affect Plaintiff and her husband financially. Those issues continue to the present.

25. In early 1996, an employee threatened to sue the district for overtime wages claimed to be due her.

26. By letter dated April 22, 1996, the president of the Missouri State Council of Fire Fighters, ("MSCFF"), threatened to sue Defendant for overtime wages purportedly owed employees.

27. Plaintiff's husband stands to gain financially if a suit against Defendant for overtime wages is successful, as he is among the class of employees who would receive an award.

28. A petition has been filed with the Missouri State Board of Mediation attempting to organize employees of Defendant into a collective bargaining unit.

29. The MSCFF seeks to include Plaintiff's husband in the bargaining unit.

30. A hearing was scheduled on the proposed collective bargaining unit before the State Board of Mediation on August 15, 1996. The status of that meeting is not known to the Court.

31. Inclusion of Plaintiff's husband within the proposed bargaining unit will affect Plaintiff and her husband

financially because the union will negotiate benefits and wages on behalf of the union members.

32. Defendant, at its April 23, 1996 meeting, voted to change the hours worked by its employees, an issue that had been pending before the board since 1994.

33. The change in hours worked by employees has affected Plaintiff's husband financially in that his hourly wage increased as a result of the change. 34. Plaintiff interprets the Missouri Conflict of Interest Law as prohibiting her from discussing only those board matters that specifically address her husband by name.

35. If given the opportunity, Plaintiff would attend, actively participate in, and vote on matters affecting her and her husband financially, including the union organization litigation and the determination of hours worked by employees.

36. If Plaintiff is allowed to participate in certain confidential board matters, the effective functioning of Defendant will be impaired because other board members will be reluctant to freely and openly discuss items of business with Plaintiff present during those discussions.

37. Plaintiff, while admitting that she is properly excluded from certain board discussions, is asking this Court to rescind Resolution #2 in its entirety.

38. Defendant is a statutory ambulance district and ultimately answers to the taxpayers of the District.

39. Defendant passed the resolutions to comply

with state law, to prevent the appearance of impropriety, and to preserve the effectiveness of the board.

40. The resolutions were not passed in response to or out of concern for any view, position, expression, or statements made by Plaintiff concerning any matter of public debate facing Defendant.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 42 U.S.C. Sections 1983, 1988, and 1367 and venue is appropriate.

2. Any issue concerning the propriety of Resolution #1 is moot, as such resolution was rescinded prior to the commencement of this action.

3. Resolution #2 is "content-neutral" as that term is used in first amendment jurisprudence, as it was not adopted due to any disagreement with the message conveyed by Plaintiff's speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted). Indeed, Plaintiff never conveyed any message by her speech, even before adoption of the resolutions.

4. Resolution #2 is narrowly tailored to serve the significant governmental interests of preventing the appearance of government corruption and promoting the effective functioning of the political subdivision so long as Plaintiff's husband is employed in his present position with Defendant.

5. Resolution #2 leaves open ample alternative

channels of communication for Plaintiff. The resolution only prohibits her participation and discussion in certain limited, confidential board matters at board meetings where those items are discussed in closed session. The matters referenced in Resolution #2 should mandate the Plaintiff to voluntarily recuse herself but it is clear from her testimony that she would not do it voluntarily.

6. Because Resolution #2 is content-neutral, is narrowly tailored to serve significant governmental interests, and leaves open ample alternative channels of communication, the burden, if any, on Plaintiff's speech is justifiable as a reasonable time, place, and manner restriction. Ward, supra.

7. The cases holding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment are inapposite. Each of those authorities deals with the expressive content of a public official's speech, while Resolution #2 is not directed to the expressive content of Plaintiff's speech.

8. Further, even assuming arguendo that Resolution #2 impinges on Plaintiff's core political speech, it nonetheless survives first amendment scrutiny because it is narrowly tailored to further compelling interests of Defendant. Perry Educ. Ass'n. v. Perry Local Educs'. Ass'n., 460 U.S. 37 (1983).

9. The interests of Defendant in preventing the

appearance of government corruption, in complying with the law, and promoting the effective functioning of government have been held to be "compelling". Buckley v. Valeo, 424 U.S. 1 (1976); Wrzeski v. City of Madison, Wis., 558 F. Supp. 664 (W.D. Wisc. 1983).

10. Resolution #2 is narrowly drawn to promote these compelling government interests. Resolution #2 deals only with confidential information (See Section 105.450(5) RSMo.) and information that would provide Plaintiff and her husband with a pecuniary gain. It substantially tracks the language of Section 610.021 RSMo. of the open meetings statute and Section 105.452 RSMo. of the conflict of interest statute.

11. Plaintiff's reliance on the "prior restraint" doctrine is misplaced. The authorities dealing with this doctrine routinely have to do with publication of speech by news media. Snepp v. U.S., 444 U.S. 507 (1980). However, even under the "prior restraint" doctrine, Resolution #2 is permissible because it survives the strictest first amendment scrutiny.

12. Resolution #2 complies with the provisions of the Missouri "Regulation of Conflict of Interest and Lobbying" Law, Section 105.450 RSMo. et. seq. Section 105.476 provides, in pertinent part, "... nothing in Sections 105.450 - 105.498 shall prohibit any political subdivision from establishing additional or more stringent requirements than those specified in sections 105.450 - 105.498." To the

extent, if any, Resolution #2 establishes additional or more stringent requirements than Sections 105.450 et. seq. RSMo., they are expressly authorized by and in compliance with Section 105.476 RSMo.

13. Plaintiff has not established entitlement to injunctive relief because she has not prevailed on the merits. Defendant will be injured if the injunction is granted. The public interest strongly favors preventing the appearance of corruption. Dataphase Sys., Inc. v. C L Sys., Inc., Inc., 640 F. 2d 109, 114 (8th Cir. 1981) (en bane); Amoco Production Co. v. Gambell, 480 U.S. 531, 546 n. 12 (1987) (citation omitted).

ORDER

IT IS, THEREFORE, ORDERED that Plaintiff's request for injunctive relief is denied and this case is dismissed. Each party to pay its own costs.

_____

Fernando J. Gaitan, Jr.
United States District Judge

Dated: SEP 27 1996
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

CHRISTINA PEEPER,	)
Plaintiff,	)
v.	) Case No.
	) 96 4228-CV-C-2
CALLAWAY COUNTY	)
AMBULANCE DISTRICT,	)
Defendant.	)

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's request for injunctive relief is denied and this case is dismissed. Each party to pay its own costs.

ENTERED ON: SEPTEMBER 30, 1996

September 27, 1996 R. F. Connor
Date Clerk

_____
(by) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORDER
FILED, OCTOBER 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3864WMJC

Christina Peeper,	*
Appellant,	*
	* Order Denying
	* Petition for
v.	* Rehearing and
	* Suggestion for
	* Rehearing En Banc
Callaway County	*
Ambulance District,	*
etc.,	*
Appellee.	*

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge Bowman, Judge Wollman, Judge Beam and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

October 29, 1997

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, Section 1 (1868)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. Section 105.450(5) (1994).

Definitions

As used in sections 105.450 to 105.498 and sections 105.955 to 105.963, unless the context clearly requires otherwise, the following terms mean:

(5) "Confidential information", all information whether transmitted orally or in writing which is of such a nature that it is not, at that time, a matter of public record or public knowledge;

Mo. Rev. Stat. Section 105.450(5) (1994).

Definitions

As used in sections 105.450 to 105.498 and sections 105.955 to 105.963, unless the context clearly requires otherwise, the following terms mean:

(5) "Confidential information", all information whether transmitted orally or in writing which is of such a nature that it is not, at that time, a matter of public record or public knowledge;

Mo. Rev. Stat. Section 105.452 (1994). Prohibited acts by elected and appointed public officials and employees

No elected or appointed official or employee of the state or any political subdivision thereof shall:

(1) Act or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or

employee by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value paid or payable, or received or receivable, to himself or any third person, including any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act, other than compensation to be paid by the state or political subdivision; or

(2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse, his dependent child in his custody, or any business with which he is associated;

(3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person;

(4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or his spouse or dependent children, including but not limited to increases in retirement benefits, whether received from the state of Missouri or any third party by reason of such act. For the purposes of this subdivision, "special monetary benefit" means being materially affected in a substantially different manner or degree than the manner or

degree in which the public in general will be affected or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree than the manner or degree in which such class will be affected. In all such matters such officials must recuse themselves from acting and shall not be relieved by reason of the provisions of section 105.460, except that such official may act on increases in compensation subject to the restrictions of section 13 of article VII of the Missouri constitution; or

(5) Use his decision-making authority for the purpose of obtaining a financial gain which materially enriches himself, his spouse or dependent children by acting or refraining from acting for the purpose of coercing or extorting from another anything of actual pecuniary value.

Mo. Rev. Stat. Section 105.476 (1994). Applicability of other provisions of law--additional standards

Nothing in sections 105.450 to 105.498 shall be interpreted as exempting any individual from applicable provisions of any other laws of this state or the provisions of any charter or ordinance of other political subdivisions in the state, and nothing in sections 105.450 to 105.498 shall prohibit any political subdivision from establishing additional or more stringent requirements than those specified in

sections 105.450 to 105.498.

Mo. Rev. Stat. Section 610.021 (1994). Closed meetings, records, and votes

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

(1) Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys. However, any minutes or vote relating to litigation involving a public governmental body shall be made public upon final disposition of the matter voted upon; provided, however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. Legal work product shall be considered a closed record;

(2) Leasing, purchase or sale of real estate by a public governmental body where public knowledge of the transaction might adversely affect the legal consideration therefor. However, any minutes or vote or public record

approving a contract relating to the leasing, purchase or sale of real estate by a public governmental body shall be made public upon execution of the lease, purchase or sale of the real estate;

(3) Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body must be made available to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public. As used in this subdivision, the term "personal information" means information relating to the performance or merit of individual employees;

(4) The state militia or National Guard or any part thereof;

(5) Nonjudicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment;

(6) Scholastic probation, expulsion, or graduation of identifiable individuals, including records of individual test or examination scores; however, personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years;

(7) Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

(8) Welfare cases of identifiable individuals;

(9) Preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups;

(10) Software codes for electronic data processing and documentation thereof;

(11) Specifications for competitive bidding, until either the specifications are officially approved by the public governmental body or the specifications are published for bid;

(12) Sealed bids and related documents, until the

bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected;

(13) Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such;

(14) Records which are protected from disclosure by law;

(15) Meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest.

APPENDIX E

CALLAWAY COUNTY AMBULANCE DISTRICT

RESOLUTION

RESOLUTION

Now on this _____ day of _____, 1996, a majority of the board of the Callaway County Ambulance District ("the District"), by vote duly taken and recorded, hereby resolve as follows:

WHEREAS, Christine Peeper was duly elected to the board of directors of the District on April 2, 1996;

WHEREAS, Christine Peeper's husband, Joe Peeper, is a fulltime employee of the District;

WHEREAS, among the specific, statutorily mandated powers and duties of the District, pursuant to Section 190.060 RSMo, are to employ or enter into contracts for the employment of any person, firm, or corporation, and for professional services, necessary or desirable for the accomplishment of the objects of the District or the proper administration, management, protection or control of its property and to determine the type and amount of health, accident, disability and pension benefits for the salaried members of the organized ambulance district;

WHEREAS, Section 105.452 RSMo prohibits elected public officials, including board members of ambulance districts, from using or disclosing confidential information obtained in their official capacity with intent to result in financial gain for the official or the official's spouse and requires an elected public official to recuse when the board is considering any matter that is specifically designed so as to

provide a special monetary benefit to the official or the official's spouse;

WHEREAS, Section 105.478 imposes criminal liability for violations of Section 105.452 RSMo, the first violation being a B misdemeanor and any subsequent violation being a C felony;

WHEREAS, the undersigned board members are of the opinion many of the topics discussed by the board, including those listed more specifically below, involve confidential information that could result in financial gain or a special monetary benefit to Christine Peeper or her spouse, Joe Peeper;

WHEREAS, the undersigned board members are concerned about their potential criminal liability for aiding or abetting violations of Section 105.452 RSMo and do not want the interests of the District harmed by the use or disclosure of confidential information;

WHEREAS, the board has discussed potential litigation involving employees of the District; and,

WHEREAS, the board has previously, on April 23, 1996, passed a resolution regarding Ms. Peeper's participation in board matters and now desires to pass a new resolution to redefine and expand the scope of her involvement.

NOW, THEREFORE, be it resolved, in order to comply with applicable law and effectively prevent Christine Peeper from using confidential information concerning the District for financial gain, that the undersigned board

members desire and do hereby allow Christine Peeper to participate in any District matter except she may not participate in discussions involving, or vote upon, any of the following:

A. Legal actions, causes of action or litigation between the District and its employees and any confidential or privileged communications between the District or its representatives and its attorneys or legal work product;

B. Hiring, firing, disciplining or promoting of particular employees by the District when personal information about the employee, including information relating to the performance or merit of individual employees, is discussed or recorded;

C. Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

D. Preparation, including any discussions or work product, on behalf of the District or its representatives for negotiations with employee groups;

E. Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, including information relating to medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment; and,

F. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the

board may, by majority vote, decide to prevent Christine Peeper from hearing, participating in, or voting upon.

IT IS FURTHER RESOLVED, in order to comply with applicable law and effectively prevent Christine Peeper from acting in matters that would result in a specific monetary benefit to her or her spouse, that Christine Peeper is directed to recuse herself and if she does not recuse herself she is prohibited from hearing, participating in, or voting upon the following:

A. Budgetary items involving the compensation, benefits, and pensions paid to employees;

B. The hiring, promotion, discipline, compensation, benefits, and pensions of employees of the District; and

C. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the board may, by majority vote, decide to prevent Christine Peeper from hearing, participating in, or voting upon.

IT IS SO RESOLVED.

/s/ Jean M. Benzen

/s/ John L. Wheeler

/s/ Cynthia Smola

/s/ Kathy Courtright